

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

TIMOTHY L. VAN BUREN SR.,	)	
	)	
Plaintiff,	)	4:06CV3295
	)	
v.	)	
	)	
BURLINGTON NORTHERN SANTA FE	)	MEMORANDUM AND ORDER
RAILWAY COMPANY, A	)	
Corporation,	)	
	)	
Defendant.	)	
	)	

The parties have filed conflicting trial location requests. The plaintiff's suit against Burlington Northern Santa Fe Railway Company ("BNSF") was filed in the District court of Douglas County, Nebraska and timely removed to this forum on the basis of diversity. See filing 1. In accordance with NECivR 40.1(b), the defendant also filed a request for trial in Lincoln, Nebraska at the time of removal. See filing 3.

On January 2, 2007, within ten days of the December 15, 2006 removal,<sup>1</sup> the plaintiff filed his demand for jury trial and request for trial in Omaha, Nebraska. Filing 10. The plaintiff's trial location request was not accompanied by a supporting affidavit, (see NECivR 40.1(b)), but an affidavit of counsel was filed on January 8, 2007. See filing 13. The plaintiff filed no supporting brief.

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<sup>1</sup>"[T]he plaintiff in a removed action within ten (10) days after service of the notice of removal . . . may file a written request for trial at Omaha, Lincoln, or North Platte." NECivR 40.1(b). The computation of time under NECivR 40.1(b) is governed by Rule 6 of the Federal Rules of Civil Procedure, and Nebraska Civil Rules 6.1(b) and (c). Pursuant to these rules of computation, the plaintiff's response was due on January 5, 2007.

The plaintiff is a resident of Valley, Douglas County, Nebraska. Filing 1, Complaint, ¶ 1. His suit against BNSF arises from a grade crossing accident that occurred on County Road 7 in Leshara, Saunders County, Nebraska on June 27, 2006. Filing 1, Complaint, ¶ 4. The plaintiff claims the accident occurred because the railroad failed to maintain a safe crossing, the view at the crossing was unsafe due to view obstructions, and the train crew was operating the locomotive at an excessive rate of speed and failed to blow the train whistle as they approached the crossing. Filing 1, Complaint, ¶ 8. The defendant alleges the accident occurred because the plaintiff was obstructing or blocking the crossing, failed to look for a train, disregarded the advanced warning signs and train whistle, failed to yield the right of way to the oncoming train, and failed to timely apply the brakes to stop his vehicle before entering the right of way. Filing 6, Answer, ¶ 14. The plaintiff survived the accident, but alleges he sustained severe physical injuries, including injury to the spinal cord with resulting paraplegia. Filing 1, Complaint, ¶ 9.

It is clear from the pleadings that the parties will litigate both liability (the circumstances causing the accident), and damages (the nature and extent of plaintiff's injuries). The plaintiff wants to litigate these issues in Omaha because he received his health care in Omaha, Omaha is a closer trial location for him and his family members, and his attorneys are from Omaha. Filing 13. The defendant wants a Lincoln trial because the locomotive engineer driving the train and the conductor are from Lincoln, a trainee conductor accompanying the crew that night is from Alliance, Nebraska, and the relevant records, the claims investigator for the accident, the trainmaster for the territory where the accident occurred, the

general manager for BNSF's Nebraska Division, and defendant's attorneys are all from Lincoln. Filing 15, ex. 1.

"[T]he judge shall consider the convenience of the litigants, witnesses, and counsel" when resolving conflicting requests for place of trial. NECivR 40.1(b)(2). Based on the evidence before me, the plaintiff and his brother (with whom the plaintiff now lives) are located 48 miles from Lincoln and 23 miles from Omaha; the defendant's representatives are located in Lincoln; the medical witnesses are located in Omaha; and, with the exception of the plaintiff, the liability witnesses are located in Lincoln. I conclude that on balance, Lincoln is a more convenient trial location for the litigants and witnesses, especially since treating physicians who testify in this forum usually appear by videotape and rarely attend the trial itself.

IT THEREFORE HEREBY IS ORDERED: The plaintiff's motion to for change of trial location, filing 10, is denied. Trial of this case will be held in Lincoln.

DATED this 26<sup>th</sup> day of January, 2007.

BY THE COURT:

s/ *David L. Piester*

David L. Piester  
United States Magistrate Judge